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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 375

HAROLD A. SWANSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The petitioner, Harold A. Swanson, by his counsel of record, prays that a writ of certiorari be issued to review the judgment of the United States Court of Claims entered in the above-entitled case on May 18, 1964. (R. 81)

JURISDICTION

The judgment of the United States Court of Claims was entered on May 18, 1964, page 1A of the Appendix and page 81 of the Record. This petition is filed within ninety days from the date of the judgment. Jur-

isdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

QUESTIONS INVOLVED

(1) Whether a veteran preference eligible with a permanent status employed by the United States may be dismissed from governmental service without compliance with Sections 12 and 14 of the Veterans Preference Act of June 27, 1944 (5 USC 861 and 863) when he was, in fact, transferred from his position and grade with the International Cooperation Administration and without a break in his employment status was employed by the Agency for International Development.

(2) Where the petition filed by the petitioner in the United States Court of Claims alleged that the petitioner was transferred from his job position in the International Cooperation Administration to the Agency for International Development, can the Court below, without a hearing of the facts of the case, sustain a motion for a summary judgment made by the Respondent?

(3) Where the petitioner was employed in the International Cooperation Administration, which was abolished on November 3, 1961, and without a break in his service was given a temporary appointment, effective November 4, 1961, with the Agency for International Development, are these facts sufficient to show that the petitioner was in fact transferred to the Agency for International Development?

(4) Where petitioner, a permanent civil service employee with veteran's preference and a permanent civil service status as an employee of the International Cooperation Administration which was abolished on November 3, 1961, was given without break in service a temporary appointment on November 4, 1961 with the Agency for International Development, was this appointment a mere

subterfuge to deprive the petitioner of his rights as a veteran's preference eligible and a permanent civil service employee of the United States?

STATEMENT OF THE FACTS

The petition filed in this case in the United States Court of Claims alleged among other things that your petitioner at all of the times mentioned in the said petition was a permanent civil service employee of the United States with veteran's preference. That he was employed in the capacity of an Industrial Advisor in the International Cooperation Administration with a grade of FSR-1150-3 at a salary of $11,310.00 per annum. That the International Cooperation Administration was abolished by Section 621 (d) of the Foreign Assistance Act of 1961, enacted by the 78th Congress. That immediately upon abolishment of the International Cooperation Administration Congress created in its place an agency known as the Agency for International Development.

The petitioner alleged in his petition that without a break in his services as an employee of the United States, upon the creation of the Agency of International Development, which took over the duties and responsibilities of the International Cooperation Administration, the petitioner was transferred on November 4, 1961 as a government employee to the Agency for International Development and was employed in his salary in grade of FSR-1150-3 at an annual salary of $14,310.00 per annum, and that he continued in such employment until January 15, 1962, when without just cause or provocation his active services were terminated, although he was kept on leave without pay until Deeember 15, 1962.

Section 621 (d) of the Foreign Assistance Act of 1961 provided in part as follows:

"On the date of the abolition of the International Cooperation Administration the President shall transfer to an officer or head of an agency of the United States Government carrying out functions under part I such offices, entities, functions, property, records, and funds of such agency, not otherwise disposed of by this Act, and notwithstanding any other provision of law, shall transfer to such officer or head of agency such personnel of the International Cooperation Administration as the President determines to be necessary."

The true facts in the case are that on the date that the International Cooperation Administration was abolished on November 3, 1961, the petitioner reported for work on November 4, 1961 and gave attention to matters which were on his desk on November 3, 1961. There was no definite break in his services. He simply went to work on November 3, 1961 and reported on November 4, 1961, giving attention to the very matters that were on his desk on the date that the agency for International Cooperation Administration was abolished.

It is the contention of the petitioner that since there was no break in his services and that he worked on the same matters that were before him on November 3, 1961 under the appointment given to him, that in fact his transfer was sufficient to come within Section 621(d) of the Foreign Assistance Act of 1961. The granting of an appointment to him as a temporary employee was a mere subterfuge in an attempt to destroy his veteran's preference and his permanent civil service rights.

The petitioner was separated from his government position without regard to his rights under Section 12 or 14 of the Veteran's Preference Act (5 USC 861 and 863).

REASON FOR GRANTING THE WRIT

The petitioner asserts that this application for certiorari is made in accordance with subdivision (b) of paragraph (1) of Rule 19 of this Court in that the United States Court of Claims has decided an important question of Federal law in conflict with the applicable statutes and has so far departed from the accepted and usual course of judicial procedure as to justify and call for the exercise of this Court's power of supervision.

At the very outset the direction of the Court is called to the provisions of the Veterans Preference Act of June 27, 1944 and particularly the provisions of Section 12 of said act (5 USC 861). The Veterans Preference Act was enacted to afford protection to those employees of the United States who had served in the military or naval services during the period of war times. Said Section 12 provides, in part, as follows:

> "And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

If there had never been any provision in the Foreign Assistance Act of 1961, as fully quoted under the statement of facts, it would have been the duty of the new agency to transfer all veterans preference eligibles and career employees, such as this petitioner was, to the new agency. The question which arises in this case is whether there was, in fact, a transfer. While the record shows that the petitioner in this case was informed that he

would not be transferred to the new agency, he, in fact, was transferred to the new agency by an appointment and continued the services he previously performed in the agency which was abolished. As pointed out in the statement of facts, and which is, of course, undisputed, the petitioner worked on the same type of matter with which he was concerned on November 3, 1961 and which were on his desk on that date. The next day, on November 4, the old agency having terminated at midnight, 1961. He had the same desk and the same problems before him. The only difference was the matter of what was designated by the officials of the new agency as a temporary employee. While they told him he was not being transferred to the new agency, the true fact was that he was, in fact, so transferred and if he was, as the petitioner contends so transferred, the new agency had no right to change his status or his grade. See *Roth* v. *Brownell*, 94 U. S. App. DC 318, 215 F. 2d 500, in which it was held that the Attorney General of the United States could not change the status of an employee who had become a permanent Civil Service employee. This Court denied certiorari 348 U.S. 863. The question is whether the officials of the new Agency for International Development could by subterfuge destroy the rights of this petitioner. The petitioner certainly had a right to show the facts in his case in regard to the manner in which he was kept on as an employee of the new agency and whether or not the officials of the new agency have connived to keep him on as an employee by a cunning device to void his rights as a veterans preference eligible and a permenent Civil Service employee. It is undisputed that he was so employed, and the petitioner alleged in his petition that he, in fact, had been transfered to the new agency. He had a right to show by testimony upon his part just what occurred when the old agency was abolished and he began to work for the new agency. For the reason that I pointed out in the statement of facts there never was any break in his service whatsoever. The work he was doing

for his old agency was the same that he performed for the new agency. If the new agency did not desire to have him as an employee his services should have been terminated at midnight, November 3, 1961 when the old agency was abolished. The Court below erred in sustaining a motion for a summary judgment in favor of the Respondent. If there were facts to be determined, as appears there are in this case, then the Court should have denied the motion of the petitioner and of the Respondent for a summary judgment.

If the petitioner was, in fact, transferred to the new agency as an employee and as a veterans preference eligible, he could be removed from his position only for cause in accordance with Section 863, Title 5 of the U. S. Code. Charges had to be filed against him. This is so well known that no citation of authorities is necessary. The Veterans Preference Act of June 27, 1944, Title 5851, et seq. was sustained by this court in *Hilton* v. *Sullivan*, 334, U. S. 322, 92 L. Ed. 1416.

CONCLUSION

For the reasons herein stated the judgment of the United States Court of Claims should be reversed and this cause should be remanded to that Court with instructions to proceed in accordance with the views of this Court.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 6-63

HAROLD A. SWA..SON

v.

THE UNITED STATES

ORDER

This case comes before the court on plaintiff's motion and defendant's cross-motion for summary judgment. Upon consideration thereof, together with oral argument by counsel and the briefs of the parties, and based upon the Foreign Assistance Act of 1961, 75 Stat. 445, and *Myers* v. *Hollister*, 226 F. 2d 346 (C.A. D.C. 1955), it is concluded that plaintiff is not entitled to recover, and

IT IS ORDERED that defendant's cross-motion for summary judgment be and the same is granted, plaintiff's motion for sumamry judgment is denied and plaintiff's petition is dismissed.

BY THE COURT

MARVIN JONES
Chief Judge.

(May 18, 1964)

IN THE UNITED STATES COURT OF CLAIMS

No. 6-63

HAROLD A. SWANSON

v.

THE UNITED STATES

I, Frank T. Peartree, Clerk, United States Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above cause, of the motions by the parties for summary judgment, and of the court order granting deft's motion for summary judgment, denying plaintiff's motion and dismissing the petition.

IN TESTIMONY WHEREOF I HAVE hereunto set my hand and affixed the seal of said court at Washington City this 23rd day of July, A. D., 1964.

FRANK T. PEARTREE
Clerk, United States Court of Claims.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 375

HAROLD A. SWANSON, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Claims (Pet. App. 1A) is not reported.

JURISDICTION

The order of the Court of Claims dismissing the petition was entered on May 18, 1964. The petition for a writ of certiorari was filed on August 12, 1964. The jurisdiction of this court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioner was entitled to the procedures provided by Section 14 of the Veterans' Preference Act prior to the termination of his temporary employment with the Agency for International Development.

STATUTE INVOLVED

Section 12 of the Veterans' Preference Act of 1944, 58 Stat. 390, provides in pertinent part:

> * * * That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. * * *

STATEMENT

The Foreign Assistance Act of 1961, 75 Stat. 424, provided for the abolition of the International Cooperation Administration (ICA) and the transfer of its functions to a new agency. By Executive Order No. 10973, 26 Fed. Reg. 10469, the President ordered that the ICA be abolished and that the Agency for International Development (AID) assume its functions with such ICA personnel "as the Administrator

[of AID] shall deem necessary." Delegation of Authority No. 104, Section 1(c), 26 Fed. Reg. 10608.

Petitioner had been employed by the ICA as an Industry Advisor and was notified by letter of the AID Administrator that he would not be among those to be transferred to AID and that his employment would terminate with the abolition of ICA on November 3, 1961 (R. 37). The letter indicated, however, that petitioner would be given a temporary 30-day appointment in AID, together with such leave status as might be necessary, in order to permit the orderly processing of his termination (*ibid.*). Extensions of this temporary appointment were thereafter granted in order to enable petitioner to exercise re-employment rights elsewhere and to apply to a review board for reconsideration of the decision that he should not be permanently transferred to AID (R. 42-46, 56, 72-73). On January 5, 1962, petitioner was advised by the Administrator of AID that, on consideration of the review board's recommendation and other information submitted by him, it had been determined that his services were not needed by AID (R. 54). In order to enable petitioner to secure other federal employment and to establish his eligibility for retirement, the Administrator offered temporarily to continue petitioner on the rolls on leave or leave-without-pay status (*ibid.*). Petitioner thereupon requested to be continued on this status and, by two subsequent enlargements, the appointment was extended to December 15, 1962 (R. 72-73). In November 1962, petitioner obtained employment with the

Department of Commerce, and he was formally separated from AID on November 7, 1962 (R. 74-75).

In the interim petitioner also joined in a proceeding before the Appeals Examining Officer of the Civil Service Commission in which it was contended, on behalf of petitioner and others similarly situated, that the employees of ICA were entitled to permanent employment in AID under Section 12 of the Veterans' Preference Act (R. 47-53). The officer ruled that by virtue of Section 621(d) of the Foreign Assistance Act, Section 12 was inapplicable to employment by AID of former ICA employees (R. 57-58). This ruling was affirmed by the Board of Appeals and Review of the Civil Service Commission (R. 68-69).

Petitioner instituted the present back-pay action in the Court of Claims, contending that he had been improperly discharged by AID (R. 1-4). The petition was dismissed on cross-motions for summary judgment (R. 81).

ARGUMENT

The decision of the Court of Claims was correct, and there is no need for review by this Court. Petitioner's present contention appears to be that he was, in fact, a permanent employee of AID who was entitled to the procedural protection guaranteed by Section 14 of the Veterans' Preference Act. This claim is belied by the record, which makes it abundantly clear that petitioner's original appointment was temporary only, and that each subsequent extension was on a temporary time-limited

basis. Nor is there any merit to the claim, rejected by the Civil Service Commission, that Section 12 of the Veterans' Preference Act entitled petitioner to employment by AID. The Foreign Assistance Act expressly provided in Section 621(d), 75 Stat. 445-446 as follows:

> (d) On the date of the abolition of the International Cooperation Administration the President shall transfer to an officer or head of an agency of the United States Government carrying out functions under part I such offices, entities, functions, property, records, and funds of such agency, not otherwise disposed of by this Act, as may be necessary, and *notwithstanding any other provision of law, shall transfer to such officer or head of agency such personnel of the International Cooperation Administration as the President determines to be necessary.* [Emphasis added.]

The legislative history demonstrates that in authorizing the President to transfer only such ICA employees as were deemed necessary "notwithstanding any other provision of law," Congress intended to free such transfers from any claims otherwise available under statutes protecting the rights of federal employees. See H. Rep. (Conf.) No. 1088, 87th Cong., 1st Sess., p. 63.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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October 1964.

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